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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,
Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CARL ZEISS, Inc.

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Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 267-269) is reported in 131 F. (2d) 545.

Jurisdiction

The judgment of the Circuit Court of Appeals to be reviewed was entered November 23, 1942 (R. 270). Petitioners invoke the jurisdiction of this Court under Section 240(a)

of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted May 3, 1943.

Question Presented

Whether, upon the record in this case, the court below erred in unanimously affirming a summary judgment for respondents in an action brought by informers under §§3490-3494 and 5438 of the Revised Statutes, where both courts below have found that the petitioners had presented no genuine issue as to any material fact and respondents were entitled to judgment as a matter of law.

Statutes Involved

This action was instituted under R. S. §3490, which incorporates by reference certain of the provisions of R. S. §5438 as they appeared in 1874, when the act establishing the Revised Statutes was approved. Both of these sections are contained in what is generally known and referred to as the Informer's Act, R. S. §§3490-3494, 5438 (31 U. S. C. A., §§231-235) and provide as follows:

Revised Statutes, §3490:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Revised Statutes, §5438:

> "Every person (1) who makes or causes to be made, or presents or causes to be presented, for pay-

ment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or (2) who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or (3) who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars."

Statement*

This is a civil action for damages and penalties alleged to aggregate more than $40,000,000, brought by two lawyers on their own behalf and on behalf of the United States under the Informer's Act (R. S. §§3490-3494; 5438, unamended). It was instituted a year and a half after the final disposition, in July, 1940, of certain criminal and civil proceedings which had been brought by the Anti-Trust Division of the Department of Justice. The Government had claimed that Bausch & Lomb, Carl Zeiss of Jena, Germany (not sued herein), and the other defendants herein had participated in a conspiracy and combination restrain-

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* In order to save the time of the Court, the statement in the brief of respondent Bausch & Lomb having been examined and found to be correct, is adopted herein without change, *except that there is added the paragraph at the top of page 5 hereof which shows the pleas of respondent Carl Zeiss, Inc. to the indictment and that it was not made a defendant in the equity action.*

ing foreign commerce in violation of Section 1 of the Sherman Anti-Trust Act* and in restraint of import trade in violation of Section 73 of the Wilson Tariff Act.**

Those charges were based on certain agreements entered into between Bausch & Lomb and Carl Zeiss of Jena in 1921 and 1925, and a superseding agreement made in 1926, under which Bausch & Lomb acquired the exclusive license and right to manufacture and sell military optical instruments in the United States under the inventions and patents of Carl Zeiss of Jena and assurance of its technical assistance and cooperation in scientific research for improvements and inventions in that field (R. 157-161). Carl Zeiss of Jena was to receive a royalty on all military optical instruments sold by Bausch & Lomb (R. 158). The Government did not charge either that Bausch & Lomb had a monopoly in the manufacture and sale of military optical instruments in the United States or to the United States Government, or that the purpose or intent of the agreements was to give it such a monopoly.

The anti-trust proceedings terminated in pleas of *nolo contendere*, the payment of fines and the entry of a consent decree (R. 243-248), which expressly provided that no testimony had been taken; that the defendants consented to the entry of the decree without any findings of fact "upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States * * *" (R. 243). Government counsel in charge of those proceedings, and under whose personal supervision the Grand Jury investigation preceding them was made, expressly stated in open court at the time of acceptance of the pleas, in response to a direct question by the Court, that no charge of fraud was involved in connection with the acts complained of in the indictment (R. 24). The indictment, the Government's bills of particu-

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* Act of July 2, 1890, Ch. 647, §1, 26 Stat. 209, 15 U. S. C., §1.

** Act of August 27, 1894, Ch. 349, §73, 28 Stat. 570; February 12, 1913, Ch. 40, 37 Stat. 667, 15 U. S. C., §8.

lars and exhibits, the equity complaint, and the consent decree are in the record (R. 86-248) and were before the courts below.

Respondents originally on March 29, 1940 pleaded not guilty to the indictment (R. 42, 111). On May 27, 1940, the respondent Bausch & Lomb pleaded *nolo contendere* to avoid interruption of government work (R. 23-24, 30, 110). Thereafter on March 5, 1941 respondent Carl Zeiss, Inc. pleaded *nolo contendere* (R. 42, 110) since not to have done so would have burdened it with an expensive trial. Carl Zeiss, Inc. was fined only $1000. and was not made a defendant in the equity action.

Petitioners have not denied, and the record clearly shows, that their case is based solely on the court record in the anti-trust proceedings. Yet, when they served their complaint (R. 3-10), it contained general charges of fraud predicated upon a distorted version of the plain provisions of the written agreements which were matters of record in that proceeding.

This misconstruction, which petitioners now claim to have been merely inadvertent, permeated the entire complaint. It was charged that under the agreements Bausch & Lomb agreed to and did add 20% to its prices on sales by it of military optical instruments to the United States Government, and agreed to and did pay the amount of such mark-up to Carl Zeiss of Jena. (Compare R. 25-27 and 233-236 with R. 5-8 and 221-222.) Nor was this the only distortion of facts of record to be found in that pleading.*

Desiring to obtain immediate and definitive relief against the false charges of fraud which had been made, these respondents moved for an order dismissing the complaint for failure to state a cause of action under the statute and for

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* The complaint contained other distortions of the facts of record in the anti-trust proceedings; for example, that the agreements in question (1) were made between respondent Bausch & Lomb and respondent Carl Zeiss, Inc., and (2) that the individual respondents were officers and directors not only of Bausch & Lomb but also of Carl Zeiss, Inc.

summary judgment. In conformity with the explicit requirements of Rule 56(e) of the Federal Rules of Civil Procedure, respondents submitted affidavits in support of the motion (R. 17-33), based on personal knowledge, in which the affiants set forth facts showing that there had been no fraud upon, or submission of fraudulent claims to, the United States Government. The affidavits showed the critical importance of immediate disposition of the case to avoid interruption of work for the Government. The petitioners opposed with an affidavit which clearly failed in any way to meet the requirements of Rule 56(e), contained no facts based upon knowledge in support of the complaint, and merely served to bring the anti-trust proceedings file into the record.

Just before the return day of the motion, petitioners served what can best be described as a renovated complaint (R. 78-85), withdrawing the above noted false charges. This document merely plagiarized the Government's charges in the anti-trust proceedings and added general charges of fraud to bring the case under the Informer's Act.

Respondents took immediate steps to forestall this attempt by the petitioners to delay final decision. The purported amended complaint was rejected because it was an untimely amendment as of course under Rule 15(a) of the Federal Rules of Civil Procedure (R. 51, 54-56); inasmuch as the respondents, by moving for summary judgment, had already interposed a "responsive pleading" within the fair meaning of that Rule. Respondents then moved for an order declaring the purported amended complaint a nullity and not a proper amendment as of course under Rule 15(a); and, in addition, that leave to amend in accordance therewith, if requested, should be denied. Respondents asked, however, that the purported amended complaint be considered by the District Court on motion for summary judgment as an admission by petitioners of the falsity of the charges in the original complaint. In the event that amendment were permitted, respondents in the alternative renewed the motion to dismiss and for summary judgment.

The District Court in one judgment dismissed the original complaint and granted summary judgment for all respondents (R. 259-262). In a separate order, it granted respondents' motions with respect to the attempted amendment, declared it to be a nullity, and denied leave to amend in accordance therewith (R. 254-8). Not having permitted amendment, it did not pass directly upon respondents' motions to dismiss the amended complaint, although its denial of amendment was based upon the view that it did not state a cause of action (R. 258). Petitioners appealed from the judgment and the order of the District Court. On November 5, 1942, the Circuit Court of Appeals unanimously affirmed, *Per Curiam*, the orders and judgment of the District Court, being of the opinion that whether amendment should have been permitted or not, or whether or not the proposed amended complaint, taking it as it read, stated a cause of action, summary judgment for defendants was required (R. 267-269).*

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* While the Circuit Court of Appeals found it unnecessary to decide whether the time for petitioners to amend as of course had expired, since in any event summary judgment for respondents was required, the District Court appears to have been correct in holding that the attempted amendment was a nullity because respondents, by moving for summary judgment, had interposed a "responsive pleading" to the complaint within the meaning of Rule 15(a), after which petitioners lost their right to amend as of course. In so ruling, the District Court followed the only decision on the point, *Triangle Conduit & Cable Co.* v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533 (D. Del., 1941), rev'd on other grounds, 125 F. (2d) 1008 (C. C. A. 3, 1942). The reason for limiting the right to amend without leave of court after such a motion is obvious; plaintiff must then meet the motion on the merits and should not be permitted to delay consideration by *ex parte* amendment. If he can show good grounds for amendment, the application should be made to the court which can consider them. Compare *United States* v. *Newbury Mfg. Co.*, 123 F. (2d) 453 (C. C. A. 1, 1941), which deals, however, with a motion to dismiss rather than a

(Footnote continued next page)

On January 18, 1943, this Court handed down its decision in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943). Thereupon, these petitioners, adopting a new theory of fraud, sought certiorari.

The Solicitor General filed a brief *amicus* in support of the petition apparently because Government counsel regarded the construction of the statute by the court below as using fraud in the accepted sense of deceit, as being too narrow. The brief was, naturally, concerned with what the court below said; it did not attempt to analyze this record and challenge what the Court, in fact, did in affirming summary judgment. Thus, the brief expressed apprehension as to possible disposition of cases quite unlike this one.

ARGUMENT*

1. No facts alleging actionable fraud by Carl Zeiss, Inc. are pleaded.

Respondent Carl Zeiss, Inc. was incorporated in New York December 11, 1925 (R. 88), and although its sole stockholder is Carl Zeiss, Jena, of Germany, it is a separate entity.

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motion for summary judgment. Where only a motion to dismiss is made and defendant has not invoked a scrutiny of the underlying facts, reason exists for permitting correction of the pleading without application to the Court. In holding that amendment should be denied when the proposed amendment is insufficient, the District Court was on sound ground. See *Welch* v. *T. W. Warner Co.,* 47 F. (2d) 231 (S. D. N. Y., 1930), aff'd 47 F. (2d) 232 (C. C. A. 2, 1931). It is unnecessary for this Court to pass on these questions since, as we indicate *infra,* the critical question is whether or not summary judgment for respondents was correct.

* At the request of counsel for the respondent Carl Zeiss, Inc. he has been furnished with a copy of the brief of respondent Bausch & Lomb and in order to save burdening the Court, the argument therein is not repeated though adopted in so far as it applies to Carl Zeiss, Inc.

The agreements between Bausch & Lomb and Carl Zeiss, Jena, were entered into before the incorporation of Carl Zeiss, Inc.

The affidavit of M. H. Eisenhart shows (R. 26):

> "(a) None of these agreements was made between Bausch & Lomb Optical Company and the defendant Carl Zeiss, Inc. All were made with Carl Zeiss, of Jena, Germany. Indeed, the agreement of April 28, 1921 was made more than four years before the incorporation of the defendant Carl Zeiss, Inc. Carl Zeiss, Inc. had nothing to do with any of these agreements, nor has Bausch & Lomb had any dealings with Carl Zeiss, Inc. in connection with the subject matter of these agreements."

The royalty payments made by Bausch & Lomb were to Carl Zeiss, Jena, and not to respondent, Carl Zeiss, Inc. (R. 28).

The affidavit of Karl A. Bauer states (R. 42-43):—

> ". . . Carl Zeiss, Inc. was incorporated in 1925 and never at any time in the history of its existence did it deal or was it concerned with the sale of any such instruments as are listed or any other instrument of any sort that would answer the description of military optical instruments. Its business is altogether confined to the sale of cameras, telescopes, microscopes and optical instruments as used in civil businesses. It never at any time carried any such instruments. The only charge against the defendant Carl Zeiss, Inc. made by the Government in the Anti-Trust suit was that the defendant Carl Zeiss, Inc. had declined from importing, selling or dealing in such instruments because of certain agreements made between Carl Zeiss, Jena and Bausch & Lomb Optical Company."

Carl Zeiss, Inc. was never at any time engaged in the business of producing, importing, selling or handling military optical goods.

Without conceding that the anti-trust indictment is admissible evidence on the motion for summary judgment,

it is obvious therefrom that plaintiffs had no information as to Carl Zeiss, Inc., except that which could be gleaned from the indictment or bill of particulars. The allegations of the indictment indicate that there is no basis for a claim in this action against Carl Zeiss, Inc.

The indictment (R. 86-107) alleges that the defendant

> "... Carl Zeiss (hereinafter referred to as Zeiss) is a corporation ... of Germany ... for many years has been and is now engaged in the business of manufacturing, among other things, military optical instruments at its plant in Jena, Germany, and distributing and selling those instruments in Germany and in other countries in the world." (Par. 4) (R. 87).

It will be noted that Carl Zeiss, Jena, and not respondent Carl Zeiss, Inc. is referred to in the indictment and also in the amended complaint (R. 79) as Zeiss, and it will be noted further that the manufacturing was done outside the United States and there is no allegation of any manufacturing of military goods within the United States by Carl Zeiss, Jena or by respondent Carl Zeiss, Inc., the allegation as to activities in countries other than Germany being limited according to the statement of the indictment to

> "distributing and selling those instruments in Germany and in other countries of the world."

The indictment further alleges in Paragraph 16 (R. 93):

> "The defendants, Bausch & Lomb and Zeiss, from on or about April 28, 1921 to the date of the presentation of this indictment ... have been continuously engaged during and throughout the periods of time aforesaid in an unlawful combination and conspiracy to suppress and limit competition between themselves by agreeing (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; ... (d) that Zeiss would not permit any person, firm or cor-

poration which was engaged, or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery or equipment of Zeiss on any terms in connection with such manufacture and distribution even though such persons, firms or corporations were ready, willing and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery or equipment. . . ."

Paragraph 10 (R. 90) of the indictment alleges:

> "For many years prior to 1921, Bausch & Lomb and Zeiss competed with each other . . . in the sale of . . . military optical instruments. Since 1921, Bausch & Lomb and Zeiss have not competed either in the United States or any other countries in the world in the sale and distribution of military optical instruments."

Paragraph 14 (R. 92) of the indictment, second sentence, states:

> ". . . Zeiss has shipped the said military optical instruments from points in Europe to Bausch & Lomb. . . . Except for the said military optical instruments so shipped, neither Bausch & Lomb nor Zeiss has shipped to or imported into the United States any military optical instruments which have been manufactured outside the United States."

It would appear from the quotations from Paragraphs 10 and 14 of the indictment, therefore, that respondent Carl Zeiss, Inc. has not received any military optical instruments from Carl Zeiss, Jena, and has not been by its parent company permitted to import or handle military optical instruments.

Paragraph 17 (R. 98) states:

> "(f) At all times subsequent to May 1, 1921, to and including the three years next preceding the date

> of the return of this indictment . . . Zeiss has refused to permit any person, firm or corporation engaged in, or who wished to engage in the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments and equipment of Zeiss for the production of military optical instruments even though such persons, firms and corporations were ready, willing and able to compensate Zeiss for any such use."

From the foregoing it appears that Carl Zeiss, Jena, the German corporation, manufactured military optical instruments exclusively at Jena, Germany; that it never sold (nor permitted the distribution of) such military optical instruments in the United States, but only throughout the rest of the world; that respondent Carl Zeiss, Inc. was merely a distributing and selling corporation neither manufacturing nor producing, and that it never received or sold military optical instruments within the United States, although it was the "instrumentality and agency of Carl Zeiss, Jena" for "distributing and selling" other instruments for Zeiss in the United States. The indictment and amended complaint show in effect that respondent Carl Zeiss, Inc. never manufactured, produced, imported, owned, handled or disposed of military instruments at any time subsequent to May 1, 1921.

The indictment alleges, Paragraph 17 (R. 99):

> "(h) At all times subsequent to on or about December 11, 1925, to and including the three years next preceding the date of the return of this indictment, Carl Zeiss, Inc. has refused to sell military optical instruments for use in the United States."

They could not do other than refuse to sell, since as the indictment (R. 94) states:

> ". . . Zeiss would not permit any person . . . to engage in the United States in the business of manufacturing and distributing military optical instru-

ments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery or equipment of Zeiss . . . in connection with . . . manufacture and distribution. . . ."

It is contended that the refusal (R. 99) on the part of respondent Carl Zeiss, Inc. to sell military instruments which it never manufactured, produced, imported, owned, handled or dealt in is not actionable fraud.

If this respondent can be sued for refusal to sell merchandise which it never had, no corporation in the United States would be free from such suit. A shoe shop, a druggist, a restaurant or liquor store, might be subject to indictment and civil liability for refusal to sell such instruments. They would be liable if Carl Zeiss, Inc. is liable. The mere fact that Carl Zeiss, Inc. handled other articles produced by Carl Zeiss, Jena, does not make it liable for refusing to sell merchandise with which its parent company never supplied it and which it never possessed.

The petitioners evidently considered that they had tied Carl Zeiss, Inc. into the alleged conspiracy by alleging that Carl Zeiss, Inc. was the "instrumentality and agency and wholly owned subsidiary of Zeiss and is completely dominated, controlled and operated by Zeiss."

Although Carl Zeiss, Jena, completely owned and controlled by stock ownership Carl Zeiss, Inc., this would not have made that subsidiary liable unless the officers and directors of Carl Zeiss, Inc. performed affirmative acts supporting the alleged conspiracy claimed to have been entered into by officers of the parent company. The only act complained of on the part of Carl Zeiss, Inc. was refusal to sell what they never had. The parent corporation may have been guilty of many offenses but unless these were brought home to the officers of the subsidiary and these officers aided and abetted therein, the corporation and such officers would neither be liable as a principal nor as accessory.

It may be that guilt and liability to an informer can be imputed to the officers of a holding corporation, if the sub-

sidiary or its employee personnel commits overt acts, but the contrary is not true. Guilt and liability to an informer cannot be imputed to the subsidiary and its officers for the overt acts of the dominant corporation. There is no allegation in the indictment or amended complaint of any overt act on the part of respondent Carl Zeiss, Inc. among all the allegations of conduct on the part of the other defendants. The only allegation is refusal to sell, and refusal to sell is quite understandable and quite clearly free from fraudulent intent or civil liability in view of the allegations that Carl Zeiss, Jena, the principal, would not permit any person, firm or corporation to use its devices in the manufacture or distribution of military optical instruments in the United States, except Bausch & Lomb.

It is possible that a subsidiary corporation may be liable

> "to the extent that they became cooperators in the combination",

as was true in the case of *United States* v. *American Tobacco Co.*, 221 U. S. 106, but that was an equity case brought to prevent the continuance of alleged violations of the Anti-Trust Law.

In an injunction case the Government may very properly enjoin the continuance of violations and include subsidiary corporations, agents, employees and attorneys of the parent corporation. Very little guilt need be shown to justify the court in enjoining subsidiary corporations as defendants which potentially may be or become participants in a continuing practice, but a complaint of an informer must be otherwise tested and a subsidiary corporation is not subject to liability unless it shall have been a cooperator in the combination and have committed an offense or done some fraudulent act that is the basis of the action.

If the petitioners are right in their contention, every employee of every corporation indicted or sued under the monopoly statutes could be indicted and civilly held, although such employees were entirely ignorant of any knowledge of the corporate conspiracy alleged.

Let us suppose someone called at the place of business of Carl Zeiss, Inc. and said to a salesman that he wished to purchase certain military optical goods. Let us assume that his employer was not a manufacturer, producer, importer, owner, handler or dealer in such goods,—and such is the fact—and the salesman said that he could not sell them. Could such salesman thereupon be indicted or be sued for conspiracy in restraint of trade? It is patent that he could not be so held. If his employer had not furnished him such goods to sell and there was no stock of such merchandise available for the employee to sell, it would be a dastardly situation if such salesman could be held for refusing to sell what was unavailable for sale.

Carl Zeiss, Inc. was a selling agency for Carl Zeiss, Jena, and in effect a salesman. The refusal on the corporate salesman's part to sell what the corporate salesman did not possess is not a refusal that should furnish the basis of a conspiracy charge, any more than if the corporate salesman were a salaried clerk.

2. An informer's action lies only against defendants who have submitted fraudulent claims for payment by the United States or benefited thereby.

Carl Zeiss, Inc. never submitted any claim to the United States for payment and hence does not come within the purview of the Informer's Statute.

As stated in petitioners' brief, p. 15:

> "In essence, therefore, the statute imposes liability—so far as here important—upon those who do two things: (1) submit claim for 'payment' by the United States, (2) knowing that such claims are 'fraudulent'."

The amended complaint alleges (R. 83):

> "The defendants, other than Carl Zeiss, Inc. . . . have presented for payment and approval to various

> officers of the . . . United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States . . ."

To the same effect is paragraph Seventeenth of amended complaint:

> "such bids, claims . . . were presented by the defendants, other than Carl Zeiss, Inc."

So that it appears unequivocally in the record that one of the essentials imposing liability under the statute is missing, and hence Carl Zeiss, Inc. is not subject to the informer's action.

In *United States ex rel. Kessler* v. *Mercur Corporation, et al.*, 13 F. Supp. 742 (S. D. N. Y.—1935), affd. 83 F. (2d) 178; cert. den. 299 U. S. 576, Judge Patterson says as to the statute involved in this case:

> ". . . An informer's action will therefore lie only in cases where the defendant has made false, fictitious or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' "

This he took from *United States* v. *Cohen* (1926) 270 U. S. 339, pp. 345-346, where an indictment brought under Sec. 35 of the Penal Code was dismissed. In Ch. 351 of the Laws of 1909, Sec. 5438, of the Revised Statutes was repeated verbatim as Sec. 35 of the Penal Law so that the case is directly in point. The opinion points out clearly that Sec. 35 of the Penal Law relates only to the payment or approval of a claim against the Government based upon the Government's own liability for the claim. Further, at p. 346, it particularly holds that under Sec. 35 of the Penal Law the crime is restricted to defrauding the Government in dealing with the Government, and that Sec. 37 of the Penal Law (which has nothing to do whatever with the

Informer's Statutes) makes it a crime to conspire against the Government.

The United States cannot recover against this respondent under the Informer's Statute unless Carl Zeiss, Inc. presented for payment and approval to the officers of the United States bids, claims, invoices, bills, vouchers, statements and accounts against the United States, and petitioners herein have affirmatively stated that only defendants "other than Carl Zeiss, Inc." presented for payment and approval such bids, claims, etc.

3. An action under the informer's statute cannot be maintained against a corporation.

Carl Zeiss, Inc. is a dometsic corporation, incorporated under the laws of the State of New York (R. 78).

Section 3490 of the Revised Statutes states that an action may be brought against

> "any person not in the military or naval forces of the United States, etc."

The word "person" used in this section does not include a corporation, and the action could only be brought against an individual defendant.

See,

> *United States* v. *Kansas Pacific Ry. Co., et al.*, (1877) Fed. Case No. 15506 (26 Fed. Cases, p. 680).

The court, at p. 681, says:

> "If possible, in construing statutes, the legislative intent must be ascertained from the words of the act itself; and as the last act does not seem to indicate an intention to enlarge the scope of the act of 1863, but merely to arrange its provisions under different sections and titles, we may well look to the original act for light on this subject. Did section 3 contemplate

> bringing corporations within its provisions? It would seem not. It provides that every person, not in the military or naval forces, who shall commit the act, in addition to the penalty and forfeiture, may be imprisoned, etc. Section 5438, Revised Statutes, has the same provisions. These statutes evidently refer to such a class as are capable of being employed in the land or naval forces, or in the militia. It is further provided, in section 5 of the first act, that, in a suit to recover this forfeiture and damages, such person may be arrested and held to bail. The same provision is contained in section 3492 of the Revision. These various provisions of the law indicate to my mind that, in using the word person in the act of 1863, and in the Revised Statutes, it was the intention to restrict it to individuals, and not to make it applicable to corporations."

More recently in *United States* v. *Cooper Corporation*, 312 U. S. 600, it was likewise held that the United States was not a person under the construction of the statute involved therein.

CONCLUSION

The petition should be denied in so far as it concerns Carl Zeiss, Inc. and the decision below affirmed.

Respectfully submitted,

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October, 1943